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NO.

Supreme Court, U.S.
FILED
JUL 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

OKC LIMITED PARTNERSHIP,
Petitioner,

v.

PHILLIPS OIL COMPANY.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July 16, 1987

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit properly applied the standards for granting summary judgment enunciated by this Court in *Anderson v. Liberty Lobby, Inc.*, _____ U.S. _____, 106 S.Ct. 2505 (1986) in affirming the district court's granting of summary judgment in favor of respondent and denying petitioner a trial on the merits of its reformation claim and whether in affirming the district court, the Fifth Circuit implicitly adopted a more lenient standard for granting summary judgments in cases tried to the court than cases tried to a jury.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner, OKC Limited Partnership, and OKC Corp. Liquidating Trust, formerly OKC Corp., now in bankruptcy, and the respondent, Phillips Petroleum Company.

Following institution of this lawsuit, the original plaintiff, Aminoil, USA, Inc., changed its name to Aminoil, Inc. and thereafter merged with Phillips Oil Co., which subsequently merged with Phillips Petroleum Company.

Both C.K.B. and Associates and Cloyce K. Box are general partners of OKC Limited Partnership.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87-

OKC LIMITED PARTNERSHIP,
Petitioner,

v.

PHILLIPS OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OKC Limited Partnership (hereinafter referred to as "OKC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.[1]

OPINIONS

The Fifth Circuit's order denying petitioner's application for rehearing (App.A) is unreported; the Fifth Circuit's ruling on the merits (App. B) is reported at 812 F.2d 265; the judgment of the district court (App. C) is unreported; the findings and conclusions entered by the district court on the accounting phase of the lawsuit

[1] OKC Corp., an original defendant, has filed a petition under Chapter 11 of the Bankruptcy Code. Under Section 362(a)(1) of the Bankruptcy Code, OKC Corp.'s appeal of the district court judgment was stayed. However, OKC Limited Partnership was unaffected by the stay of proceedings against OKC Corp. and thus brings this petition in its name.

(App. D) are unreported; and the minute entry of the district court granting respondent's motion for summary judgment (App. E) is also unreported.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on March 17, 1987, and a timely petition for rehearing was denied on April 17, 1987. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Fed. R. Civ. P. 56(c) provides in relevant part:

> The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT

This case involves the summary judgment standards set forth by this Court in *Anderson v. Liberty Lobby, Inc.* _____ U.S. _____, 106 S.Ct. 2505 (1986). The action was instituted by Phillips Oil Company's predecessor, Aminoil USA, Inc. ("Aminoil"), seeking interpretation of a farmout agreement and an assignment of mineral lease rights executed by Aminoil in favor of OKC and an accounting under Aminoil's interpretation of those documents. Aminoil contended that its reserved interest under the farmout and assignment applied to the entirety of a particular offshore block, South Pass Block 89. OKC sought reformation of the agreements on the basis that the parties had, by mutual mistake, improperly reduced an antecedent

contract to writing. As alleged by OKC, the parties' antecedent agreement restricted Aminoil's reserved interest to production from a specific platform on the Block, Platform "A."

Aminoil subsequently moved for partial summary judgment and also filed a separate motion *in limine* to exclude parol evidence to be offered by OKC for purposes of interpretation and/or reformation of the farmout. By minute entry, the district court granted both motions, adopting Aminoil's interpretation of the farmout and dismissing OKC's counterclaim for reformation. (App. E.) In granting summary judgment, the district court necessarily determined that there was no *genuine* issue of material fact as to OKC's reformation claim and found that Aminoil's reserved interest applied to the entirety of South Pass Block 89. OKC was, therefore, not afforded the opportunity to present its evidence in support of the reformation claim at a trial on the merits.

Thereafter, the accounting portion of the trial was held. The issue presented was whether OKC could charge interest and litigation expenses incurred in this matter against the parties' net profits account set forth in the farmout. OKC urged that the net profit provisions of the farmout clearly and unambiguously allowed these charges. The lower court rejected this contention and allowed expert testimony to the effect that the provisions of the parties' agreement did not allow the charges sought by OKC. (App. D.)

The Fifth Circuit affirmed the judgment encompassing both determinations of the lower court by decision rendered on March 17, 1987. (App. B.) The Fifth Circuit premised its decision affirming the summary judgment on the liability portion of the lawsuit on the holding in *Anderson v. Liberty Lobby, Inc.*, _____ U.S. _____, 106 S.Ct.

2505 (1986). In affirming the summary judgment, the Fifth Circuit purported to view the evidence in the light most favorable to OKC. *Phillips Oil Co. v. OKC Corp. and OKC Limited Partnership*, 812 F.2d 265, 271 (5th Cir. 1987). Three factual assumptions in favor of OKC were made by the Fifth Circuit:

(1) that OKC and Aminoil reached an "antecedent agreement";

(2) that the parties intended that the agreement would be reduced to writing; and

(3) that there is a material variance between the antecedent agreement and the written instrument.

812 F.2d at 275 (footnote omitted). Despite these assumed facts, the Fifth Circuit concluded that the sophistication of the parties, the review process employed by OKC, and the centrality of the provision at issue to the farmout preclude any possibility that there was "mutual mistake" sufficient to support the claim of reformation. 812 F.2d at 276.

On March 31, 1987, OKC timely filed its application for rehearing with the Fifth Circuit, which, on April 17, 1987, denied the application for rehearing. (App. A.) Thereafter, the instant petition for a writ of certiorari was filed in a timely fashion with this Court.

REASONS FOR GRANTING THE WRIT

The instant case involves an appellate court's interpretation of the standards for granting a summary judgment enunciated in *Anderson v. Liberty Lobby, Inc., supra.* The Fifth Circuit's decision in the present case constitutes

a misinterpretation of the *Anderson* decision and an unwarranted expansion of the summary judgment procedure. Further, the Fifth Circuit here implicitly adopted a standard for granting summary judgment in cases to be tried to the court which is considerably more lenient than that applied in jury cases. Simply stated, the Fifth Circuit decision improperly resolved disputes concerning genuine issues of material fact and improperly deprived OKC of a trial on the merits.

1. The Fifth Circuit Misapplied *Anderson v. Liberty Lobby* and Has Impermissibly Broadened the Summary Judgment Remedy.

It is axiomatic that the summary judgment procedure set forth in Fed. R. Civ. P. 56 is not a substitute for trial on the merits. *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 458 (1962). Summary judgment is a "drastic remedy" that prevents a claimant from presenting his cause of action to a jury of his peers. *Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir. 1981). In *Anderson v. Liberty Lobby, Inc., supra*, this Court defined more particularly the relevant standards for determining the propriety of summary judgment in federal court. In that case, it was held that, in finding whether a "*genuine*" issue of fact exists for purposes of denying a summary judgment, the threshold inquiry is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 2511. No genuine issue for trial exists unless there is sufficient evidence favoring the nonmoving party for a factfinder to find for that party. *Id.* This Court noted that the inquiry was analogous to that made under the directed verdict standard of Fed. R. Civ. P. 50(a); the inquiry thus is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of

law." *Id.* at 2511-12. Finally, the Court in *Anderson* held that in ruling on a motion for summary judgment, the judge must "view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 2513.[2]

Anderson left undisturbed the general rule that a party opposing the motion is to be given the benefit of all reasonable doubt in determining whether a genuine factual issue exists and that all reasonable inferences most favorable to the party opposing the motion must be drawn. The Court stated:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

106 S.Ct. at 2513 (citations omitted). In the instant case, while paying lip-service to *Anderson*, the Fifth Circuit totally ignored the traditional limitations on the summary judgment procedure reaffirmed in *Anderson* and proceeded to resolve all contested facts and/or factual inferences against the party opposing the summary judgment, OKC.

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[2] In *Anderson*, the Court determined that the actual malice standard for actions brought by public figures must be utilized in evaluating whether a genuine issue of fact exists for defeating a summary judgment in a libel action. This is an action for reformation which requires proof by "clear and convincing" evidence. *See Prejeant v. Hero Lands Co.*, 244 So.2d 613, 618 (La. App. 4th Cir. 1971).

At the outset, in affirming summary judgment against OKC's reformation claim, the Fifth Circuit noted that a mistake sufficient for reformation must be "mutual" and must be shown by "clear and convincing" evidence. In reviewing the evidence offered by OKC in opposition to the summary judgment motion through the prism of this substantive evidentiary burden, however, the Fifth Circuit has effectively made the summary judgment procedure a substitute for a full trial on the merits and has utilized this drastic remedy to resolve genuine factual disputes.

As noted *supra* at pp. 4-5, the Fifth Circuit initially recognized that it must view the evidence in the light most favorable to OKC. Thus, for purposes of the summary judgment, the appellate court found that discussions between Aminoil and OKC regarding the farmout began in late 1976 or early 1977. During these discussions, Aminoil first advised OKC that it wanted to retain an overriding royalty interest convertible upon payout of Platform A to a net profits interest in production from Platform A. 812 F.2d at 267. Hence, Aminoil initially proposed assigning to OKC Aminoil's entire interest in Block 89, subject to Aminoil's retention of an interest in production from Platform A, in return for OKC's assumption of Aminoil's cost obligations with regard to the Block. As noted by the Fifth Circuit, OKC "agreed to the proposal and according to OKC, no further communications occurred between the parties concerning different terms." *Id.* Thereafter, a telex dated March 25, 1977, was prepared by Aminoil, setting forth the text of a letter of intent to be executed by the parties. In the telex, Aminoil described its retained interest with specific reference to Platform A and concluded with the representation that Aminoil would "enter into a farmout agreement which incorporates the aboe [sic] conditions and such other conditions as the parties agree are appropriate." 812 F.2d at 267-68.

Following this representation, Aminoil undertook to draft the required documents. It was during this unilateral drafting process that the farmout was changed to reflect Aminoil's retained interests in the entire Block rather than only Platform A. Aminoil never advised OKC of the revision. 812 F.2d at 268 & 268 n. 4. Thereafter, the farmout, as now revised by Aminoil, was delivered to OKC. Over a period of approximately five weeks, the farmout as revised by Aminoil was reviewed by various OKC employees. 812 F.2d at 268. And, thereafter, the revised farmout was executed by OKC.

Analyzing these facts, the Fifth Circuit abandoned the principle that it must view the evidence in the light most favorable to OKC. First, it reasoned that OKC's review process established that OKC could not have been mistaken when it entered into the farmout. The appellate court stated that it was "inconceivable, particularly in view of the review process employed here and the expertise of those involved in that process, that a 'mistake' as clear and significant as the one alleged by OKC could have 'slipped by.' " 812 F.2d at 277 (footnotes omitted). This determination resolves all inferences adversely to OKC.[3] That is, the Court *assumed* that the particular OKC employees who undertook the review *had knowledge of the antecedent contract.* There is no record support for this inferential

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[3] In addition to resolving factual inferences adversely to OKC, the Fifth Circuit decision ignored well-settled Louisiana jurisprudence that a pre-execution review of a document does not bar reformation. The failure to understand a variance between a preliminary and final contract, upon reading, simply does not preclude an action for reformation under Louisiana law. *Weber v. H. G. Hill Stores, Inc.*, 210 La. 977, 29 So.2d 33 (1946). If the contrary were true, then no action for reformation would ever be viable because in such an action there is always a variance between the preliminary and final agreement, the effect of which was not noticed by the complaining party, that forms the basis for the action. *E.g., Evangeline Refining Co. v. Nunez* 153 So.2d 886 (La. App. 3d Cir. 1963).

finding. Further, this assumption, or inference, in favor of Aminoil is directly in conflict with the obligation undertaken by Aminoil in its earlier telex to enter into a farmout which "incorporates" the antecedent agreement. 812 F.2d at 268. Clearly, therefore, not only did the Court fail to resolve this factual dispute in favor of OKC, it actually resolved it in favor of Aminoil.

That the mistake must be mutual does not mean that both parties must agree at the trial, or on summary judgment, that the mistake was in fact made. As stated in *Prejeant v. Hero Lands Co.,* 244 So.2d 613, 618 (La. App. 4th Cir. 1971):

> We note defendant's argument that reformation can only be had in case of mutual error, and that defendant shows it was not under any error. This argument ignores the paradoxical truism that every defendant in a case alleging mutual error denies the error; otherwise he would have consented to an extrajudicial act of correction and there would have been no lawsuit. . . . .A contract is reformed only when the evidence shows that the parties did mutually agree to a bargain erroneously recorded in the written contract.

Thus, while "clear and convincing" proof of the antecedent agreement and mutual error is required, this does not mean that the evidence must be uncontradicted or may not be conflicting. If the evidence in favor of the party seeking reformation and the evidence taken as a whole satisfies the mind of the factfinder that the writing, because of mutual mistake or fraud, does not express the true agreement of the parties, reformation will be allowed. *See* 66 Am. Jur. 2d *Reformation of Instruments,* § 125 at p. 651 (1973 ed.).

Since mutual error is, as a practical matter, never admitted in reformation cases, the rule of "material variance"

was developed to provide an inferential guide for the fact-finder to determine the existence of mutual mistake. This rule of material variance is grounded upon the common sense recognition that if a prior agreement contemplates the execution of a subsequent contract and the existence of certain provisions in that subsequent contract, the existence of a material variance between the two agreements must be the result of either a change of intention or, absent such a change, a mutual mistake. *See Tate v. Ludeau,* 195 La. 954, 197 So. 612 (1940) (nothing substantial appearing to show a change in the original intention, either by oral or written word, either by antecedent or contemporaneous event or circumstance, held that the record as presented was indicative of a sustained rather than a vacillating or changed intention and reformation awarded). Here, there is clearly a material variance between the telex setting forth the parties' antecedent agreement and the final executed contract. Absolutely no evidence was presented in support of the motion for summary judgment to suggest a changed intention on Aminoil's part. Nevertheless, the Fifth Circuit ignored these facts and the inferences to be drawn from them.

Finally, the Fifth Circuit reasoned that "the evidence *clearly* indicates a *deliberate* decision on the part of Aminoil, mid-way through the drafting process" to change the antecedent agreement. 812 F.2d at 278 (emphasis added). There was no evidence offered in connection with the summary judgment which reflected, or even remotely suggested, that Aminoil made a "deliberate decision" to change the parties' antecedent agreement. In fact, Aminoil represented and agreed in its telex that it would enter into a farmout which incorporated the conditions set forth in the telex: *i.e.,* that its reserved interest would be limited to Platform "A." After entering into this commitment, the error appeared in the internal drafting process of Aminoil. *No* evidence was offered by Aminoil in support of the sum-

mary judgment to indicate a changed intention or anything else other than an error in drafting. In fact, the record clearly indicated that after obligating itself to draft the farmout in accordance with the antecedent contract, "no further communications occurred between the parties concerning different terms" made by Aminoil. 812 F.2d at 267 & 268 n.4. The Fifth Circuit inferred a deliberate intent on the part of Aminoil to change the parties' agreement -- an inference directly against OKC.

The instant case is analogous to *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). In that case (cited with approval in *Anderson v. Liberty Lobby, Inc., supra*, 106 S.Ct. at 2510-11), this Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. In *Adickes*, one of the issues was whether there was a conspiracy between Kress employees and police officers to deprive plaintiff of her civil rights. The district granted summary judgment for the defendants, stating that there was no evidence from which reasonable jurors might draw an inference of conspiracy. This Court reversed, noting that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury . . . to *infer from the circumstances*" that there had been a meeting of the minds and a conspiracy. 398 U.S. at 159.

In affirming summary judgment, the Fifth Circuit assumed that there was material variance between the parties' antecedent agreement and the final writing. After making this assumption, the appellate court resolved all of the factual inferences against OKC. There was no evidence in the record that Aminoil changed its intention or that the OKC employees who reviewed the document knew of the prior agreement, discovered the change and agreed to it. Clearly, the factfinder could have found that there was no change in Aminoil's intent, that the change was made as a

result of mistake, and that OKC executed the changed document as a result of mistake. In affirming the summary judgment, the Fifth Circuit impermissibly short-circuited the resolution of these critical factual findings.

2. The Fifth Circuit Implicitly Adopted a Non-Jury Summary Judgment Standard More Lenient than the Summary Judgment Standard Applied in Jury Cases.

As noted above, the Fifth Circuit's affirmance of the lower court summary judgment necessarily required the appellate court to draw factual inferences against OKC. In a lengthy footnote in the opinion, the Fifth Circuit noted that there was no request for a jury trial in this case. 812 F.2d at 273-74 n. 15. In this footnote, the appellate court further stated that "this circuit has arguably articulated an even more lenient standard for summary judgment in certain nonjury cases." *Id.* Citing a prior decision of the circuit, the court reasoned that "where the judge is the trier of fact, as was the case here, he may be in a position to draw inferences without resort to the expense of trial, unless there is an issue of witness credibility." 812 F.2d at 274 n.15, quoting *Alabama Farm Bureau Mut. Casualty Co. v. American Fidelity Life Ins. Co.*, 606 F.2d 602, 609-10 (5th Cir. 1979), *cert. den.*, 449 U.S. 820 (1980). Nevertheless, the court, in this same footnote, disclaimed any intention to determine whether there was a "nonjury summary judgment standard" different from the summary judgment standard applied in jury cases since it reasoned that the affirmance here was based on the general summary judgment standard and *Anderson v. Liberty Lobby, Inc., supra.* Despite this disclaimer, petitioner respectfully submits that the Fifth Circuit did, in fact, employ a more lenient standard for granting summary judgment than otherwise would have been applied had this been a jury matter.

In the instant case, and as noted above, the Fifth Circuit inferred that the review process undertaken by OKC was such that it was "inconceivable . . . that a 'mistake' as clear and significant as the one alleged by OKC could have 'slipped by.' " 812 F.2d at 277 (footnote omitted). Moreover, the Fifth Circuit found a *deliberate* intent by Aminoil to change the parties' antecedent agreement; this finding can only be construed as an inference by the appellate court since there was no direct record evidence supporting this finding. It is clear, therefore, that despite the Court's disclaimer in footnote 15, it did in fact purport to "draw inferences without resort to the expense of trial" against OKC. And these inferences drawn by the appellate court adversely to OKC can only be explained if the Fifth Circuit adopted a standard for granting summary judgment in this non-jury matter more lenient than that applied in a jury case.

Such a distinction between the standards for granting a summary judgment in non-jury as opposed to jury matters finds absolutely no support in the rule. Rule 56(c) provides that a summary judgment shall be rendered if there is "no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. The statute does not contemplate one standard for granting summary judgments in jury matters and another for determination of such motions in non-jury matters.

In cases tried to the court without a jury, the judge, as trier of fact, is empowered to find against plaintiff at the close of his evidence *even if* he has presented a *prima facie* case. Fed. R. Civ. P. 41(b). If the court so rules, it must make findings of fact and conclusions of law. The implication of the Fifth Circuit here that the trial judge may exercise this same power in non-jury cases in connection with a summary judgment would transform the summary judgment hearing into a full-blown trial with the requisite

findings and conclusions and the determination of facts or factual inferences. There is simply no basis for such a transformation of what is necessarily a summary proceeding tried on affidavits and other documentary evidence. *See* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 Yale L.J. 745, 759 n. 63 (1974).

There is no question but that under Fed. R. Civ. P. 56, whether in a jury or non-jury trial, the party opposing the summary judgment motion has the right to a full evidentiary hearing on all genuine issues of material fact. In a bench trial, this means that if the party opposing summary judgment raises any triable fact questions, he has the right to adduce the testimony of his live witnesses and cross-examine his opponent's witnesses rather than to have to rely on the affidavits submitted in opposition to the summary judgment motion. *See United States v. J. B. Williams Company, Inc.,* 498 F.2d 414, 430 n. 19 (2d Cir. 1974). The rationale for this approach was stated in *Colby v. Klune,* 178 F.2d 872, 874-75 (2d Cir. 1949):

> [H]ow can the judge know, previous to trial, from reading paper testimony, what he will think of the testimony if and when, at a trial, he sees and hears the witnesses? It is because of the crucial element of demeanor-observation that a trial judge's findings are usually binding unless "clearly erroneous"; his findings have not that effect when he has not observed the witnesses.
>
> "All manner of expedients," says Dean Pound, "have been resorted to * * * to arrive at a written settlement of the facts not dependent on the credit to be accorded witnesses or the impression they may make on the particular trial court. * * * But experience has shown that we cannot be sure that in getting a clear-cut statement of facts in this way, to which the law may be applied, we are

> not cutting out too much, so in the end to be trying an artificial case instead of the real controversy."

(footnotes omitted), *quoting* Pound, *Appellate Procedure in Civil Cases*, 29 (1942 ed.). Simply stated, all that is required in opposing a summary judgment is sufficient evidence supporting the claimed factual dispute "to require a *jury or judge* to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968) (emphasis added); *see* 6 J. Moore, *Moore's Federal Practice*, ¶ 56.02 [7] (1987 ed.).

CONCLUSION

Summary judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 612 (5th Cir.1967). The instant case is one of the early appellate court decisions to interpret this Court's decision in *Anderson v. Liberty Lobby, Inc. supra*. The Fifth Circuit failed, however, to properly apply the *Anderson* rule and rendered an opinion which impermissibly broadens the summary judgment remedy. For these reasons, petitioner respectfully submits that certiorari should be granted to review the decision below of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ATTORNEYS FOR OKC
LIMITED PARTNERSHIP

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
Apr 17 1987

No. 86-3322

PHILLIPS OIL COMPANY,

Plaintiff-Appellee,

versus

OKC CORPORATION, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(April 17, 1987)

Before RANDALL, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:
/s/ Carolyn Randall

APPENDIX B

PHILLIPS OIL COMPANY,
Plaintiff-Appellee,

v.

OKC CORPORATION, et al.,
Defendants-Appellants.

No. 86-3322.

United States Court of Appeals,
Fifth Circuit.

March 17, 1987.

Oil company brought action against oil developer seeking declaratory judgment that company's reserved interest in "farm-out" agreement applied to entirety of lease and all production therefrom, and seeking accounting on that basis. The United States District Court for the Eastern District of Louisiana, Marcel Livaudais, Jr., J., granted company's motion for partial summary judgment, and developer appealed. The Court of Appeals, Randall, Circuit Judge, held that: (1) notwithstanding material variance between antecedent agreement and written instrument, written instrument could not be reformed under Louisiana law, and (2) finding that charges for interest and litigation expenses claimed by developer were prohibited under agreement was supported by expert testimony.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RANDALL, JOHNSON and JONES, Circuit Judges.

RANDALL, Circuit Judge:

Appellant, OKC Corporation ("OKC"), appeals from the district court's grant of partial summary judgment in favor of appellee, Phillips Oil Company ("Aminoil"),[1] and the decision in favor of Aminoil on trial of the accounting portion of the action. We affirm.

I.

On July 1, 1967, Aminoil, with three partners, acquired from the United States a lease covering an area in the Gulf of Mexico known as South Pass Block 89 ("Block 89"). Aminoil and its partners, known collectively as the SLAM Group, each acquired a ¼ working interest in Block 89.

According to OKC, from 1967 to 1977, exploratory wells drilled on Block 89 revealed the presence of Hydrocarbon reserves having only marginal economic value. As of early 1977, those reserves thought to be recoverable were considered to be located in the northeast portion of Block 89.

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[1] After the instant lawsuit was instituted, plaintiff-appellee, Aminoil, USA, Inc., changed its name to Aminoil, Inc. Thereafter, Aminoil, Inc. merged with Phillips Oil Company, which subsequently merged with Phillips Petroleum Company. We will refer to plaintiff-appellee as "Aminoil."

In 1976, the operator of Block 89 for the SLAM Group, Marathon Oil Company ("Marathon"), proposed installation of a platform, designated as Platform A, in the northeast portion of Block 89 to drain the known reserves. According to OKC, development of the block in the area south of the platform was not anticipated.

Prior to Marathon's proposal, Aminoil had conducted internal reviews of geological data pertaining to Block 89. According to OKC, this information suggested that there were approximately four million barrels in "proven" and "potential" oil reserves in the area where Platform A was to be located. Another four million barrels were considered "possible," but the possibility of recovering them was "poor." According to OKC, Aminoil believed that even these "possible" reserves were located in the area to be drained by Platform A wells.

Based on its economic review, Aminoil chose not to participate in the proposed installation of Platform A or in the costs of further development. Instead, Aminoil decided that it would "farm out" its interest in Block 89 to a party willing to bear the construction costs of Platform A in exchange for the acquisition of an interest in the Block 89 lease.

In consideration of certain obligations to be undertaken by OKC, and subject to the reservation of an overriding royalty which was convertible to an escalating net profits interest, Aminoil "farmed out" its entire ¼ working interest in Block 89 to OKC under a written agreement ("the Farmout") executed June 14, 1977. Aminoil and OKC subsequently executed, on July 11, 1977, an "Assignment of Interest in Oil and Gas Lease," pursuant to the

Farmout.[2]

Discussions concerning a possible farmout of Aminoil's interest in Block 89 began sometime in the fall of 1976 or the early months of 1977. According to OKC, at their first meeting, officials of OKC and Aminoil discussed the opportunity for OKC to acquire Aminoil's interest in Block 89 but did not discuss the reservation by Aminoil of any interest in the property. According to OKC, negotiations continued after the first meeting, with Aminoil representative, Harry Fisher, for the first time advising OKC representative, Gary Adams, that Aminoil wanted to retain an overriding royalty interest convertible upon payout of Platform A to a net profits interest in production from Platform A.

Adams advised OKC President Cloyce Box of Aminoil's desire. According to OKC, Box discussed the matter with Aminoil's George Dawson who proposed assigning to OKC Aminoil's entire interest in Block 89,

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[2] In 1977, OKC Corporation was a publicly held corporation whose stock was traded on the New York Stock Exchange. In May of 1981, OKC Corporation concluded a corporate liquidation. Its assets, including the interest in Block 89, were transferred to OKC Limited Partnership, which is also a defendant in this case. OKC Corporation's interest in this lawsuit was transferred to OKC Limited Partnership. The parties stipulated that any judgment in this case applies equally to OKC Corporation and OKC Limited Partnership.

Subsequent to entry of judgment in the district court, OKC Corporation filed a petition under Chapter 11 of the Bankruptcy Code. Upon inquiry by this court into the question of what effect, if any, the automatic stay had on continuation of this lawsuit, counsel for OKC noted that there are two defendants in this lawsuit: OKC Corporation and OKC Limited Partnership. Both defendants filed notices of appeal from the district court's judgment. Counsel for OKC concluded that under section 362(a)(1) of the Bankruptcy Code, OKC Corporation's appeal is stayed. However, OKC Limited Partnership is unaffected by the stay of proceedings against OKC Corporation.

subject to Aminoil's retention of an interest in production from Platform A, in return for OKC's assumption of Aminoil's cost obligations with regard to the Block. Box agreed to the proposal and according to OKC, no further communications occurred between the parties concerning different terms. A telex, dated March 25, 1977, was prepared by Aminoil, outlining the text of a letter of intent to be executed by the parties. In the telex, Aminoil described its retained interest with specific reference to Platform A.[3] The telex concluded with the representation that Aminoil would "enter into a farmout agreement which incorporates the aboe [sic] conditions and such other conditions as the parties agree are appropriate." Aminoil undertook to draft the required documents.[4]

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[3] The telex read, in part:

> 5. Aminoil will retain an overriding royalty interest equal to one-twelfth (1/12) of one fourth (1/4) of eight-eights (8/8) until payment of Platform A and all wells drilled therefrom including production facilities.
>
> 6. Upon payout, Aminoil's overriding royalty interest will automatically convert to a net profits interest equal to twenty percent (20%) of one-forth (1/4) of eight-eights (8/8) until recovery from first production of four million gross barrels of oil condensate and/or gas equivalent based on 10 MCF equaling one gross barrel of oil and/or condensate; thereafter, Aminoil's net profits interest shall be increased to thirty-three percent (33%) of one-fourth (1/4) of eight-eights (8/8).

[4] OKC, in its brief to this court, says that analysis of the drafting revisions leading to the final version of the Farmout shows the error committed in the Farmout's preparation. Detailing the drafting process, OKC shows that the three initial drafts of the Farmout speak of Aminoil's reserved interest and/or "net profits" with specific reference to Platform A. The fourth draft for the first time defines Aminoil's net profits interest as a portion of "first production from subject lease," and contains the definition of net profits found in the Farmout: "Aminoil shall look exclusively to the oil, gas, condensate, and other hydrocarbons, and all minerals produced from the subject lease for the satisfaction and realization of the net profits interest." According to OKC, Aminoil never advised OKC of the revisions being considered at Aminoil.

On May 11, 1977, the proposed Farmout was delivered to OKC, under the letter of Aminoil's Roger Edwards. Under the terms of the proposed Farmout, Aminoil agreed to assign its entire ¼ interest in the Block 89 lease to OKC, subject to Aminoil's reservation of an overriding royalty convertible to an escalating net profits interest as provided in Paragraph IV of the proposed Farmout:

> Aminoil shall reserve to itself from the interest to be assigned under the terms of this agreement, an overriding royalty interest equal to one-twelfth (1/12) of one-fourth (1/4) of eight-eights (8/8) of production, until "net profits" are received as the term is defined hereafter, at which time Aminoil's overriding royalty interest shall automatically convert to a net profits interest equal to twenty percent (20%) of one-fourth (1/4) of eight-eights (8/8) of production from the subject lease of four million (4,000,000) gross barrels of oil, condensate and/or gas equivalent based on ten (10) MCF of gas equaling one (1) gross barrel of oil and/or condensate; thereafter Aminoil's net profits interest shall be increased to thirty-three percent (33%) of one-fourth (1/4) of eight-eights (8/8).

Over a period of nearly five weeks, the proposed Farmout was reviewed by various OKC officials.[5] On June 14, 1977, OKC's Executive Vice-President, without reading

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[5] Prior to his employment with OKC, OKC's General Counsel, Dan McAllen, worked in the legal department of Gulf Oil Corporation where for more than two years he examined, drafted, and reviewed contracts by which mineral interests are assigned and transferred, known in the oil and gas industry as farmouts and farmins, on a weekly basis. He was familiar with the concept of a farmout and reserved interests.

Upon receipt of the proposed Farmout, McAllen directed a memorandum dated May 12, 1977, to Norman Smith, OKC's Vice-President of Operations, requesting that Smith review the proposed

the Farmout himself, executed the Farmout without making any changes in the document that had been submitted by Aminoil to OKC for approval. On July 11, 1977, Norman Smith, one of the OKC employees who had reviewed the Farmout, accepted the assignment of one-quarter interest in Block 89 by virtue of the "Assignment of Interest in Oil and Gas Lease" subject to the Farmout.

From 1977 to 1980, exploratory wells were drilled in the southern portion of Block 89 and substantial accumulations of hydrocarbons were discovered. In 1980, the fabrication and installation of a development platform,

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(footnote 5 continued)
Farmout and advising that he was also forwarding the Farmout to OKC's James Fajack and Gary Adams for their review. Smith held a business degree and a law degree and also had prior experience in oil and gas transactions. Fajack was OKC's Vice-President for Finance and its chief financial officer since 1972. Prior to his employment with OKC, Fajack, a CPA, had been manager of Ernst & Whinney's audit staff in New York where his major clients were British Petroleum and REA Express.

The proposed Farmout was also reviewed by P.J. Gaitonde, OKC's controller. Gaitonde, also a CPA, holds an MBA. Gaitonde, at Fajack's request, was particularly concerned with Aminoil's reserved overriding royalty and net profits interest. He prepared a memorandum dated May 16, 1977, which contained his statement that "Aminoil retains an overriding royalty interest of 1/12 of OKC's interest (25%) until 'net profits' is achieved."

On June 14, 1977, McAllen drafted a memorandum to OKC's Executive Vice President, Gary Adams, advising him that the terms of the proposed farmout were satisfactory for execution:

> Please be advised that I have examined the captioned Farmout Agreement, and the agreement is satisfactory for execution by OKC Corp. I have furnished a copy of the farmout letter to Jim Fajack and Norman Smith and asked that the net profits interest calculation contained in the agreement is satisfactory from the standpoint of OKC, and Norman had no comments.

Cloyce Box, President, Chairman of the Board and chief executive officer of OKC, and Leo Wright, OKC's geologist, testified that they reviewed the Farmout immediately prior to or after its execution.

Platform B, in the southern portion of Block 89 were proposed.

The instant controversy arose in February of 1981 when OKC, in aid of its liquidation,[6] mailed a public bid letter to various oil and gas companies, including Aminoil. The bid letter suggested that Aminoil's reserved interest was restricted to Platform A in the northern portion of Block 89, instead of the entirety of Block 89 (including Platform B). Following its receipt of OKC's bid letter, Aminoil filed the instant action against OKC seeking a declaratory judgment that Aminoil's reserved interest under the Farmout applied to the entirety of the Block 89 lease and all production therefrom, and for an accounting on that basis. The action was filed in federal district court on the basis of diversity jurisdiction.

Aminoil's complaint alleged that its reserved overriding royalty and net profits interest was effective as to *all* production from the subject lease, that this was disputed by OKC, and that Aminoil was entitled to a declaratory judgment in accordance with its interpretation of the agreements. OKC denied the correctness of Aminoil's interpretation of the Farmout and counterclaimed alleging error and seeking reformation of the Farmout to conform with OKC's argument that Aminoil's reserved interest was restricted to production from Platform A. OKC asserted that the mutual intent of the parties under the Farmout reserved overriding royalty and net profits interest did not apply to production from the entire lease, but rather, only to production from Platform A.

Aminoil responded to OKC's counterclaim, contending that the Farmout clearly and unambiguously

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[6] *See supra* note 2.

reflected the parties' understanding and mutual interest would apply to the lease and all production therefrom. Additionally, Aminoil alleged that if OKC were in error as to the extent of Aminoil's reserved interest, such error was the result of OKC's own negligence, fault or inattentiveness in reviewing, or failing to review, the Farmout.

Aminoil moved for partial summary judgment and also filed a motion *in limine* to exclude parol evidence to be offered by OKC.[7] By minute entry dated July 27, 1984, the district court granted both motions. The court found that Aminoil's reserved interest applied to all production from the entirety of Block 89, saying that "the intent of the parties with regard to the scope of Aminoil's consistent and extensive manner which leaves no doubt as to what was intended." Minute Entry at 6. The court concluded that:

> insofar as the scope of Aminoil's reserved overriding royalty and net profits interest, the Farmout and Assignment are clear, unambiguous and complete and, under controlling legal principles, parol evidence is inadmissible to vary or modify the words of the contract or to prove an intent different than that which is unmistakably and clearly stated in the contract.[8] Because, as a matter of fact and

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[7] The motion for partial summary judgment had been denied in March of 1983 and was reurged at the pretrial conference held on March 28, 1984. The motion to exclude parol evidence was also reurged at the pretrial conference, having been argued on December 7, 1983, and continued to the time of trial.

[8] The court opined that "[p]arol evidence is inadmissible to vary, modify or explain the provisions of a contract which is complete on its face as to intent and purpose." Minute Entry at 11. The court continued:

> In this case, insofar as the scope of Aminoil reserved interest is concerned, Aminoil and OKC did *not* fail to clearly state their intent nor did they state it ambiguously, or incompletely, rather their intent, in all pertinent respects, could not have been stated more clearly. Insofar as the scope of Aminoil's interest

> law, the Farmout and Assignment provide that Aminoil's reserved interest shall apply to the entirety of Block 89, summary judgment is appropriate on these grounds alone....
>
> Additionally, this Court finds that a review of the undisputed circumstances surrounding the execution of the Farmout confirms Aminoil's contention that the clear language of the Farmout expresses the true intent of the parties, and precludes any reasonable probability of error.
>
> ...after first executing the Farmout after extensive review and analysis without requesting a single charge, OKC again expressly ratified that same Farmout several weeks later.

Minute Entry at 14-15 (footnote omitted). The court added that:

> If OKC was in error during the negotiations, whether by its own fault or otherwise, the circumstances surrounding the execution of the contract lead this Court to conclude that there can be no legitimate dispute that OKC was not, or should not, have been laboring under that error, however caused, after reviewing the Farmout for five weeks. OKC cannot possibly carry its burden of proving that it was somehow misled by Aminoil and the Court's conclusion in this respect provides an equally strong and additional basis for granting Aminoil's partial summary judgment. Furthermore, established legal principles which are also applicable to these facts preclude any such claim by OKC; *Hope v. Bartham*, [28 F.Supp. 561 (W.D.La. 1939)].[sic]

(footnote 8 continued)
the Farmout is complete and parol evidence is inadmissible.
Minute Entry at 12.

Minute Entry at 19.

The district court ordered OKC to render an accounting to Aminoil for all proceeds of production attributable to Aminoil's overriding royalty interest and net profits interest in accordance with the court's construction of the Farmout.

OKC's accounting was served on Aminoil on September 18, 1984, and Aminoil, through the report of its retained accountants from the accounting firm of Price Waterhouse & Co., excepted to the accounting, taking issue with one of the credits and several of the charges made by OKC against net profits. Pursuant to the provisions of Rule 706 of the Federal Rules of Evidence, the district court appointed its own expert witness who submitted a written report and thereafter was deposed.

Prior to trial of the accounting phase of the lawsuit, OKC and Aminoil resolved all issues under the accounting except two issues made by OKC to the net profits account: (1) a $29,666,997 interest charge,[9] and (2) a $514,728 charge for legal expenses incurred in connection with the instant lawsuit. OKC contended that it was entitled under the Farmout to recoup these amounts from production from the lease before Aminoil's overriding royalty converted to the net profits interest.

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[9] Of the $29,666,997 in interest which OKC claimed was chargeable against the net profits account, $7,900,000 was incurred for capital borrowed by OKC and attributable to costs of exploratory and developmental operations on, and production of minerals from, Block 89. The remainder of the total interest figure, $21,766,997, is imputed interest or the time value of money utilized by OKC to participate in operations on, and production of minerals from, Block 89, calculated at the rates and by the methodology reflected in the net profits accounting.

Trial of the accounting issues was held on November 1, 1985.[10] By stipulation of the parties, subject to objection by OKC as to certain portions of the testimony, testimony of the court's expert was introduced by way of his deposition. Aminoil called two Price Waterhouse & Co. partners to testify at trial. They were accepted by the district court as experts in oil and gas accounting. The testimony of the experts was to the effect that the charges against the net profits account for interest and litigation expenses related to the instant lawsuit were not properly made by OKC. OKC offered no testimony or evidence at trial in support of its net profits accounting and no evidence in contravention of the testimony of the experts. Instead, OKC simply objected to the admission of expert testimony. By Findings and Conclusions entered on March 6, 1986, the district court rejected OKC's contentions, and held that, under the net profits accounting provisions of the Farmout, the interest and litigation expenses were not chargeable against the net profit account.

Judgment consistent with the granting of Aminoil's motion for partial summary judgment and the decision on the trial of the accounting portion of the action was rendered on April 8, 1986. This appeal followed.

II.

On appeal, OKC argues that the district court erred in granting partial summary judgment in favor of Aminoil. OKC contends that established Louisiana jurisprudence allows the use of parol evidence in support of a reformation claim, even when a contract is clear and unambiguous on

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[10] The parties both conceded that the accounting issues would be resolved by application of the net profits accounting provisions of the Farmout.

its face, and argues that, in this case, admissible parol evidence shows an antecedent agreement and a material variance between that agreement and the Farmout eventually signed. Therefore, argues OKC, summary judgment was improper.

OKC contends that, contrary to the district court's conclusion that "a review of the undisputed circumstances surrounding the execution of the Farmout confirms Aminoil's contention that the clear language of the Farmout expresses the true intent of the parties, and precludes any reasonable probability of error," Minute Entry at 14, there is a genuine issue of material fact created by the circumstances leading up to the execution of the Farmout. According to OKC, "[t]he critical and disputed issue in this case is whether prior to the execution of the written contract, there existed antecedent contract between the parties, which, as a result of mutual error, was incorrectly reduced to writing." Original Brief of Defendants-Appellants at 28. OKC argues that, viewing the evidence in the light most favorable to OKC (as we do in considering the propriety of the grant of summary judgment),[11] the existence of a genuine issue of material fact is clear. According to OKC, evidence—both oral and written—shows that there was an antecedent agreement which was incorrectly reduced to writing as a result of mutual error:

> At the time of the negotiations between Aminoil and OKC, Aminoil was anxious to escape its then pending cost obligations attributable to the lease. In fact, Aminoil's original proposal was to transfer its full interest in consideration of OKC's assumption of those obligations. Subsequently, that proposal was modified to allow for Aminoil's reservation of an overriding royalty *convertible upon*

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[11] *See* discussion *infra* at Part IIA.

payout from Platform A production of the costs and expenses of Platform A and its wells to a net profits interest in Platform A production. Ultimately, OKC orally agreed to this proposal, and there were no further communications between the parties concerning different terms....

Aminoil's retention of an interest only in Platform A production made perfect sense. The only known recoverable reserves on the Block were located in the area to be drained by Platform A. Further, Platform A was the only platform contemplated for installation by the SLAM partners. No thought at that time was being given to the location of another Platform in other areas of the Block....

The existence of a prior agreement between OKC and Aminoil limiting Aminoil's retained interest to production from Platform A is also reflected in the documents prepared by Aminoil prior to the execution of the farmout agreement. In the March 25, 1977 telex, Aminoil represented and agreed that it would enter into a farmout agreement which "incorporates" the conditions set forth in the telex. Despite this, there is a major material variance between the farmout agreement drafted by Aminoil and the March 25, 1977, telex, which also was drafted by Aminoil. This material variance developed during Aminoil's internal drafting process.

Original Brief of Defendants-Appellants at 28-29. OKC argues further that the reformation claim is not barred by negligence because mutual error, not unilateral error, was alleged. Finally, OKC contends that there was no showing that OKC had the requisite knowledge to ratify the

Farmout by subsequently executing the assigned agreement. We turn now to a consideration of OKC's contentions.

A.

As a matter of federal procedural law,[12] the granting of summary judgment under Rule 56 of the Federal Rules of Civil Procedure is proper when, viewed in the light most favorable to the party opposing the motion, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[13] *See, e.g., Anthony v. Petroleum Helicopters, Inc.*, 693 F.2d 495, 496 (5th Cir. 1982). On review, this court applies the same legal standard applied by the district court to determine whether summary judgment was appropriate. *See, e.g., id.* at 496. The party opposing the motion is to be given the benefit of all reasonable doubt in determining whether a genuine factual issue exists. *See, e.g., Kellerman v. Askew*, 541 F.2d 1089, 1092 (5th Cir. 1976); *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982). In determining whether a genuine issue of material fact exists, "the court must draw all reasonable inferences most favorable to the party opposing the motion" for summary judgment. *Faloona v. Hustler Magazine*, 799 F.2d 1000, 1004 (5th Cir. 1986); *see, e.g., Anderson v. Liberty Lobby, Inc.*, — U.S. —, 106 S.Ct. 2505,

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[12] The standard to be applied is a federal standard. *See Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); *see also Lighting Fixture & Electric Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969).

[13] Rule 56(c) provides, in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R. Civ.P. 56(c).

2513, 91 L.Ed.2d 202 (1986); *Harrison v. Byrd*, 765 F.2d 501 (5th Cir. 1985); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984).

In its recent opinion in *Anderson v. Liberty Lobby, Inc., supra*, the United States Supreme Court, undertaking an extensive examination of the summary judgment standard, noted that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Liberty Lobby*, 106 S.Ct. at 2510 (emphasis in original); *see also St. Amant v. Benoit*, 806 F.2d 1294, 1296-97 (5th Cir. 1987).

[1] With regard to "materiality," only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment. Factual disputes that are irrelevant or that are unnecessary will not be counted. *Liberty Lobby*, 106 S.Ct. at 2510.

[2] With regard to "genuineness," the inquiry performed is a threshold inquiry of whether there is a need for a trial, that is, whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 2511. No genuine issue for trial exists unless there is sufficient evidence favoring the nonmoving party for a factfinder to find for that party. *See id.*

Considering the specific question posed by the case before it—whether the clear and convincing evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure—the Court in *Liberty Lobby* concluded that the inquiry involved in ruling on a summary judgment motion "necessarily implicates the substantive

evidentiary burden of proof that would apply at the trial on the merits." *Id.* at 2512. In the context of the libel suit before it, the Court said:

> When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times.* For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Id. at 2513. Therefore, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden," *id.,* that the parties must bear at trial.[14] The Supreme Court did caution however, that, at the summary judgment stage of a case, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 2511. The Court stated that its holding that the substantive evidentiary burden should be taken into

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[14] The Court reasoned that:

> This conclusion is mandated by the nature of this determination. The question here is whether the jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Liberty Lobby, 106 S.Ct. at 2513.

account in ruling on summary judgment motions "does not denigrate the role of the jury.... Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," *id.* at 2513, not the function of the judge ruling on a summary judgment motion.[15]

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[15] It should be recognized that there was no request for a jury trial in this case. In this regard we note that this circuit has arguably articulated an even more lenient standard for summary judgment in certain nonjury cases. A panel of this court, in *Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218 (5th Cir. 1986), after noting that the Supreme Court has said that the standard for summary judgment mirrors the standard for directed verdict under Fed.R. Civ.P. 50(a)(citing *Liberty Lobby*, 106 S.Ct. at 2511, and *Celotex Corp. v. Catrett*, — U.S. —, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)) commented that, "in the same fashion, in nonjury cases it mirrors the standards for dismissals provided by Rule 41(b)." *Professional Managers*, 799 F.2d at 223.

Rule 41(b) of the Federal Rules of Civil Procedure provides, in relevant part, that:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

Fed.R.Civ.P. 41(b). "A dismissal under Rule 41(b) differs from a directed verdict in a jury trial in that the court need not determine that the defendant is entitled to judgment as a matter of law." *DuPont v. Southern Nat. Bank*, 771 F.2d 874, 879 (5th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1467, 89 L.Ed.2d 723 (1986) (citation omitted). "Instead, as the finder of fact, the court may resolve disputed issues of fact. A Rule 41(b) dismissal is warranted when the district court, even before hearing the defendant's evidence, determines that the plaintiff has failed to offer persuasive evidence regarding the necessary elements of his case." *Id.* Under Rule 41(b), the district court is "entitled to weigh evidence, make credibility judgments, and draw inferences unfavorable to the plaintiffs." *North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330, 1333 (5th Cir. 1970) (en banc).

With this guidance from the Supreme Court in mind,

(footnote 15 continued)

In a line of cases dealing with summary judgment in the nonjury context, panels of this court have discussed the inquiry to be performed when summary judgment is sought. In a case wherein the court found that the parties did not request a jury trial, the panel stated that while a certain question is considered one of "fact" under state law, " 'to be judged in light of all the circumstances surrounding a given transaction,' ... a federal district court may nevertheless grant summary judgment on such an issue, in a non-jury case, if the '*evidentiary* facts are not disputed ... [and] trial would not enhance [the court's] ability to draw inferences and conclusions,' *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978) (emphasis added)." *Houston North Hosp. Properties v. Telco Leasing, Inc.*, 680 F.2d 19, 22 (5th Cir.) (footnote and citations omitted), *reh'g denied in part, granted in part*, 688 F.2d 408 (1982). The court has also stated that:

> Summary judgment may be improper, even though the basic facts are undisputed, if the ultimate facts in question are to be inferred from them, and the parties disagree regarding the permissible inferences that can be drawn from the basic facts. *Winter v. Highlands*, 5 Cir. 1978, 569 F.2d 297, 299. " '[T]he choice between permissible inferences is for the trier of facts.' " *Nunez v. Superior Oil Co.*, 5 Cir. 1978, 572 F.2d 1119, 1124, quoting, *Walker v. U.S. Gypsum Co.*, 5 Cir. 1959, 270 F.2d 857, 862, *cert. denied*, 1960, 363 U.S. 805, 80 S.Ct. 1240, 4 L.Ed.2d 1148. Where a jury is called for, the litigants are entitled to have the jury choose between conflicting inferences from basic facts. *Nunez, supra*, 572 F.2d at 1124. However, where the judge is the trier of fact, as was the case here, he may be in a position to draw inferences without resort to the expense of trial, unless there is an issue of witnesses credibility. *See id.* at 1124-25.

Alabama Farm Bur. Mut. Cas. Co. v. American Fid. Life Ins. Co. 606 F.2d 602, 609-10 (5th Cir. 1979), *cert. denied*, 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d 22 (1980).

Whether or not these cases set forth a "nonjury summary judgment standard" different from the summary judgment standard applied in jury cases and, if so, whether it has been universally and consistently applied in nonjury summary judgment cases are not questions we need decide here. Since we can affirm the judgment of the district court in this case on the basis of the general summary judgment standard set forth in a long line of cases in this circuit and in *Liberty Lobby*, we merely note the question of whether a different and arguably more lenient summary judgment standard should apply in nonjury cases.

we now turn to consider the propriety of the district court's grant of partial summary judgment in favor of Aminoil.

B.

[3-5] Under Louisiana law,[16] the equitable remedy of reformation of a contract is available to parties "if the instrument recites terms to which neither party agreed." *Valhi, Inc. v. Zapata Corp.*, 365 So.2d 867, 870 (La.App. 4th Cir. 1978). The reformation remedy "lies only to correct mistakes or errors in the written instrument when such instrument, as written, does not express the true contract or agreement of the parties." *Fontenot v. Lewis,* 215 So.2d 161, 163 (La.App.3d Cir. 1968). The error or mistake must be mutual. *See, e.g., Southwest Gas Producing Co., v. Hattie Bros.*, 230 La. 339, 353, 88 So.2d 649, 654 (1956); *Amoco Production Co. v. Texaco, Inc.*, 415 So.2d 1003, 1007 (La.App.4th Cir. 1982). An action to reform a written instrument "is a personal action, even when applied to real estate, and the burden of proof rests on the one seeking reformation of the instrument to establish the mutual error and mistake by *clear* and *convincing proof,* parol evidence being admissible for this purpose."[17] *Id.* (emphasis added)(citing *Argus v. Holt,* 232 La. 1026, 95 So.2d 644 (1957); *Southwest Gas Producing Co. v. Hattie Bros.*, 230 La. 339, 88 So.2d 649 (1956); *Waller v. Colvin,* 151 La. 765, 92 So. 328 (1922); *Kemp v. Beasley,* 188 So.2d 425 (La.App.3d

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[16] Because subject matter jurisdiction in this case is founded on diversity of citizenship, the case is controlled by Louisiana law.

[17] Because of our disposition of this case, we need not address OKC's claim that the district court erred in granting Aminoil's motion *in limine* to exclude parol evidence to be offered at trial. We do note, however, that it is well-established under Louisiana law that parol evidence is admissible to show mutual error and mistake in a reformation case. *See, e g.,. Daigle & Assocs., Inc. v. Coleman,* 396 So.2d 1270, 1271 (La. 1981); *Fontenot v. Lewis,* 215 So.2d 161, 163 (La.App. 3d Cir. 1968)(citing cases).

Cir. 1966); *Walker v. Jim Austin Motor Co.*, 162 So.2d 135 (La.App.1st Cir.), *writ denied*, 246 La. 354, 164 So.2d 353 (1964)). The high degree of proof required is consistent with the principle that "[w]hen parties reduce their contracts to writing and the writing exhibits no uncertainty or ambiguity as to the nature, the object, and the extent of the agreement, it is presumed that the writing expresses the true and complete undertaking of the parties." *Campo v. La Nasa*, 173 So.2d 365, 369 (La.App.4th Cir. 1964), *writ denied*, 247 La. 874, 175 So.2d 109 (1965); *cf. Southwest Gas Producing Co.*, 230 La. at 353-55, 88 So.2d at 654-55 (presumption of correctness of deed). Therefore, under Louisiana law, OKC must present clear and convincing proof of mutual mistake in order to obtain reformation.

Where, as here, the clear and convincing evidence standard applies, the court's inquiry as to whether a genuine issue exists will be "whether the evidence presented is such that a [factfinder] applying that evidentiary standard could reasonably find for *either* the plaintiff or the defendant," *Liberty Lobby*, 106 S.Ct. at 2514 (emphasis added). Stated differently, the appropriate summary judgment question will be whether the record evidence could support a reasonable finding by the factfinder either that the plaintiff has shown mutual error and mistake by clear and convincing evidence *or* that plaintiff has not. *See id.*

[6] After carefully reviewing the evidence in the record before us, including the numerous depositions and the documentary evidence, we conclude that the evidence is not such that a factfinder, applying the clear and convincing standard, could reasonably find for OKC. Looking through the prism of the clear and convincing evidence standard, the focus of our inquiry must be on the process by which the Farmout was reduced to writing and then reviewed by OKC. If that process could not admit of *mutual* error as a matter of fact, reformation will not lie.

[7] The ultimate question in a reformation case, and one that is denominated as a fact question, *see, e.g., Agurs v. Holt,* 232 La. at 1032, 95 So.2d at 646, is whether a mutual mistake was made. The critical period for purposes of analysis of that question is the period during which the proposed agreement at issue was reduced to writing and reviewed prior to the signing.[18] In analyzing the ultimate question of whether a mutual mistake was made, the court should focus on who reduced the proposed agreement to writing, who the parties to the agreement were, whether the provision at issue was central to the agreement, and what pains the parties took in reviewing the written instrument.

Since this case is before us on appeal of a grant of partial summary judgment, we view evidence in the light most favorable to OKC and with all inferences drawn in OKC's favor. For purposes of summary judgment we will assume three things: (1) that OKC and Aminoil reached an "antecedent agreement," (2) that the parties intended that the agreement would be reduced to writing; and (3) that there is a material varience between the antecedent agreement and the written instrument.[19] *See, e.g., Merritt v.*

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[18] *See, e.g., Prentice v. Amax Petroleum Corp.,* 220 So.2d 783, 789 (La.App. 1st Cir.), *writ denied,* 254 La. 455, 223 So.2d 867 (1969); *see also Aetna Ins. Co. v. Paddock,* 301 F.2d 807, 810 (5th Cir. 1962)(Texas case) ("The mistake must be in the drafting of the instrument ... and not in making the contract which it evidences."); Diaz, *Reformation of Instruments of Louisiana,* 30 Tul.L.Rev. 486, 488 ("An unintentional correctible error in the written instrument must be common to the mutual understanding of the parties and must occur in reducing the oral bargain to writing and not in the oral bargain itself.") (footnotes omitted).

[19] OKC in its brief to this court, sets forth its account of the negotiations that took place between OKC and Aminoil prior to the time that Aminoil undertook the drafting of the Farmout. We need not dwell on these facts since, for purposes of summary judgment, we accept that there was an "antecedent agreement" and that the written instrument materially varies from it.

Hays, 237 La. 557, 111 So.2d 771, 774 (1959); *Campo v. La Nasa,* 173 So.2d at 369. Even assuming, as we do, that OKC could show these three factors, our inquiry would not be at an end. Rather, the existence of those three factors simply poses the problem. Remaining for us to ascertain is whether the record evidence would support a reasonable finding by a factfinder that OKC has shown, by clear and convincing evidence, that a *mutual mistake* was made, such that the written instrument does not express the true intent of the parties *at the time the Farmout was signed.* The three factors outlined above are simply probative of that question; they are not dispositive.

Two scenarios can be posted for what might have transpired between OKC and Aminoil. The first is that a mistake was made such that the written instrument varies from the antecedent agreement and fails to reflect the true intent of the parties. The other is that there is a variance between the antecedent agreement and the written instrument, but that the parties agreed to the terms of the written instrument, and thus, that the written instrument accurately reflects their intentions at the time of signing.

The evidence, viewed in the light most favorable to OKC, supports only the second hypothesis. We accept, for purposes of our review, that OKC and Aminoil negotiated and came to an antecedent agreement, describing the reserved interest with reference to Platform A. We also accept that the parties intended that their agreement be reduced to writing and that the written instrument varies from the antecedent agreement in that it refers to a reserved interest in terms of the "subject lease," with no reference to Platform A. The fact of the variance between the antecedent agreement and the written instrument might be enough to raise a genuine issue of material fact, precluding summary judgment, were it not for the existence in the record of evidence regarding the identity of

the parties, the review process, and the centrality of the provision to the Farmout. Focusing on those factors, we find no genuine issue of material fact, that is, we find that the evidence is not such that a factfinder, applying the clear and convincing evidence standard, could reasonably find for *either* OKC or Aminoil. The evidence, viewed in the light most favorable or OKC, overwhelmingly supports the conclusion that there was no mutual mistake.

The evidence shows that the parties, both substantial companies with employees experienced in matters of the type covered by the Farmout, could and did look out for themselves. Aminoil presented the proposed Farmout to OKC for OKC's consideration and approval. Over a period of almost five weeks, OKC officials, experienced in oil and gas transactions, reviewed the proposed Farmout. Several of those OKC officials focused their attention on the very provision now at issue—the reserved interest/net profit provision[20]—and gave their approval to that provision. Further, the provision is drafted in clear and simple terms, such that even a reader with no expertise in oil and gas transactions should find it comprehensible.

> Paragraph IV of the Farmout provides:
> Aminoil shall reserve to itself *from the interest to be assigned under the terms of this agreement,* an overriding royalty interest equal to one-twelfth (1/12) of one-fourth (1/4) of eight-eighths (8/8) of production, until "net profits" are received as the term is defined hereafter, at which time Aminoil's overriding royalty interest shall automatically convert to a net profits interest equal to twenty percent (20%) of one-fourth (1/4) of eight-eighths (8/8) of production, until recovery from first production *from the subject lease* of four million (4,000,000) gross barrels of oil, condensate and/or gas equivalent based on ten

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[20] *See supra* note 5.

> (10) MCF of gas equaling one (1) gross barrel of oil and/or condensate; thereafter Aminoil's net profits interest shall be increased to thirty-three percent (33%) of one-fourth (1/4) of eight-eighths (8/8).

(emphasis added). Under the terms of Paragraph IV, Aminoil reserved its royalty/net profits interest from the "interest to be assigned," under the Farmout, that being all of Aminoil's twenty-five percent working interest in Block 89. No restrictions are apparent. When net profits were received, Aminoil's royalty interest would convert to "a net profits interest equal to twenty percent (20%) of one-fourth (1/4) of eight-eighths (8/8) of production, until recovery from first production *from the subject lease.*" (emphasis added). References to the "subject lease" continue throughout the eight-page Farmout, with, for example, the production to be considered in calculating Aminoil's net profits interest being "minerals produced from the subject lease for the satisfaction and realization of net profits interest." Further, of great significance in the analysis of this case, is the centrality of the provision at issue to the Farmout. The provision goes to a significant purpose behind the transaction between OKC and Aminoil.[21]

It is inconceivable, particularly in view of the review process employed here and the expertise of those involved in that process,[22] that a "mistake" as clear and significant

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[21] Evidence submitted by OKC regarding the initial meetings between OKC and Aminoil, showing that Aminoil did not initially raise the reserved interest issue, are not probative of the mistake question. The pertinent intent of the parties is the intent at the time of signing.

[22] While we find no case directly on point, we have gained insight into the appropriate factors on which to focus in our analysis from the observations of various counts confronted with mistake claims under Louisiana law. *See, e.g., O'Neill v. Sonnier,* 195 So.2d 724, 728 (La.App. 1st Cir. 1967) (affirming denial of reformation because defendant failed to

as the one alleged by OKC could have "slipped

(footnote 22 continued)

carry burden of proof with respect to question of mutuality of mistake; facts of case viewed in light of clear language of the lease and behavior of parties subsequent to execution negate existence of mistake claimed by defendant); *Campo v. La Nasa*, 173 So.2d at 370 ("[I]f there was error in the manner in which the lease was confected, Dr. LaNasa had full and ample opportunity to discover and rectify the same."); *White v. Myane*, 10 La.App. 195, 196, 120 So. 650, 651 (La.App. 2d Cir. 1929) (finding that plaintiff failed to make out his mutual mistake case and reasoning that "[t]he character of plaintiff's intelligence ... does not make it probable that he could have erred as he says he did.") *cf. Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1312 (5th Cir. 1983)(reversing district court's denial of summary judgment because the issues raised were barred by previously executed releases which were "unmistakably clear" as to the parties' intent; court said that "[i]n this case, we are buttressed in our decision by the omnipresence of high level executives and competent counsel throughout the entire business activities. The settlement of the many controversies between these parties was no fly-by-night transaction. After months of wrangling and negotiating the executives of Ingram and McDermott exchanged letters outlining proposed settlement terms.... This was followed by the formal releases which were drafted by the parties through their skilled and knowledgeable counsel. As the records of this Court reflect, these counsel were not novices at important litigation which must have included experience in contract drafting. Ingram, with its battery of executives and counsel, was not impotent when pitted against McDermott. It is inconsequential and unavailing for Ingram to now assert, years after negotiation and execution of its release contracts, that it did not intend to release antitrust claims."); *Hope v. Barkam*, 28 F.Supp. 561 (W.D. La. 1939)(noting in unilateral mistake case that plaintiff reviewed document that was written in clear terms.).

Although decided under Arizona law which provides that reformation will lie only if mistake, fraud, or inequitable conduct infected the underlying negotiations, causing the written document to deviate from the parties' true intent, the Ninth Circuit's opinion in *Bosse v. Crowell Collier & MacMillian*, 565 F.2d 602 (9th Cir. 1977), is nonetheless instructive. There, the court stated that:

> While questions of fact often may render summary disposition of such claims as fraud and mistake inappropriate [under Arizona law], the uncontroverted facts in this case reveal the absence of these elements. The record clearly shows that

by."[23] It cannot simply be presumed that there was merely a mistake in transcribing the agreement when we are admonished to proceed with caution and to require clear and convincing proof of the highest degree. *See Hollingsworth*

(footnote 22 continued)

plaintiffs and their attorney examined each document at the time it was executed, discussed at length with MacMillan representatives those terms and conditions about which there were differences between the parties, and fully understood what was being signed. The parties dealt at arm's length and were represented by counsel throughout the negotiations, and had full knowledge of all facts surrounding the transaction. These facts warranted the district court's conclusion as a matter of law that mistake, fraud or inequitable conduct, the necessary prerequisites to reformation, were lacking. Under these circumstances, reformation was properly denied.

Id. at 610.

[23] In this regard, we note that the claimed mistake for which reformation is sought in this case distinguishes this case from most reformation cases. The garden variety reformation case would be a case calling for the correction of an incorrect property description in an act of sale. *See, e.g., Argus v. Holt,* 232 La. 1026, 95 So.2d 644 (1957); *Brulatour v. Teche Sugar Co.,* 209 La. 717, 25 So.2d 444 (1946); *Waller v. Colven,* 151 La. 765, 92 So. 328 (1922); *Cockerham v. Aime,* 110 So.2d 138 (La.App. 1st Cir. 1959).

Of course, there are cases in which reformation was granted, upon clear and convincing proof of mistake, where the reformation sought to change the nature of the contract. *Cf. Fontenot v. Lewis,* 215 So.2d 161, 163 (La.App. 3d Cir. 1968) (reversing grant of summary judgment in reformation case because genuine issue of material fact existed as to whether there was mutual error and noting that "[t]he trial judge found that 'the attempt at reformation does not by any means address itself to minor irregularities or typographical errors in the original description; rather, the reformation seeks to drastically change the entire nature of the original description.' ").

The distinction between correction of "clerical-type" errors and correction of errors that go to the nature of the contract has been noted by Louisiana courts. *See, e.g., Price v. Taylor,* 139 So.2d 230, 236 (La.App. 1st Cir. 1962); *Merritt v. Hays,* 237 La. at 557, 111 So.2d at 771.

Some courts, called upon to reform contracts on the basis of errors

v. Edwards, 397 So.2d 34, 37 (La.App.2d Cir. 1981); *see also Crowell & Spencer Lumber Co. v. Hawkins*, 189 La. 18, 23, 179 So. 21, 23 (1938) ("In these circumstances we do not see how it can be conclusively stated that the contracting parties intended anything but what was written in the contract.").

Even if one could conclude that OKC was in error at the time it signed the Farmout—that is, that there was sufficient evidence on that issue to send it to a trier of fact—the evidence would not support a finding that the mistake was mutual. The record evidence would not support a finding that, at the time the Farmout was signed, Aminoil believed that the Farmout meant anything other than what the terms of the Farmout provide. Even if Aminoil believed, at one time, that it made a deal different from the one evidenced by the Farmout, there is no evidence that the Farmout, as signed, does not accurately reflect Aminoil's intent at the time of signing. Indeed, the evidence clearly indicates a deliberate decision on the part of Aminoil, midway through the drafting process, to reserve an overriding royalty interest in production from the subject lease as distinguished from an interest in production from Platform A.[24]

Thus, the motion for partial summary judgment was

(footnote 23 continued)

that go to the nature of the contract, as opposed to mere "clerical" errors, have suggested that the plaintiff has an even greater burden of proof. *See, e.g., Price v. Taylor*, 139 So.2d at 236 ("In the instant case the court is not called upon to reform a deed because of a mere omission of property therefrom or an erroneous description of property included therein but rather to include property which, by the terms of the act sought to be reformed, is expressly and specifically excluded therefrom. For obvious reasons an even greater burden of proof rests upon plaintiff herein under such circumstances.").

[24] *See supra* note 4.

properly granted by the district court because, bearing in mind the clear and convincing burden OKC would bear at trial, the evidence is not such that factfinder, applying that evidentiary standard, could reasonably find for *either* OKC or Aminoil. *See generally Liberty Lobby,* 106 S.Ct. at 2509-15.

III

OKC next takes issue with the district court's decision on trial of the accounting portion of this action, arguing that the district court erred in excluding charges for interest and litigation expenses from the net profits account.

OKC contends that the language of the accounting section of the Farmout clearly and unambiguously provides for the charging of "costs" to the net profits account [25] and that interest on expenditures for ineral exploration, development and production come within both the ordinary meaning of the word "cost"[26] and the meaning given the

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25. Paragraph IV(e)(1) of the Farmout provides that against the net profits account shall be charged:

> an amount equal to the *costs* to OKC of all direct labor (excluding fringe benefits), transportation, and other services necessary for exploring, developing, equipping, operating and maintaining the subject lease; and of all material, equipment and supplies purchased by OKC and used on the subject lease; and of any amounts charged to OKC in connection with the creation of any unit or units in which the subject lease is or may be concluded; and of that portion of any other amounts paid to any operator.

(emphasis added).

26. OKC argues that under the "generally prevailing meaning" of the word "cost," as taken from *Webster's Dictionary,* the interest charge represents a part of the "cost" to OKC of "labor . . . transportation, and other services necessary for exploring, developing, equipping, operating and maintaining the . . . lease; and of all material, equipment, and supplies purchased by OKC." Original Brief of Defendants-Appellants at 37.

word by accountants. OKC argues that the receipt of expert testimony to arrive at a contrary conclusion was error on the part of the district court. Further, OKC alleges that the Farmout specifically provides for the charging against the net profits account of litigation expenses incurred as a result of the ownership of the lease [27] and that the district court's conclusion that the litigation expenses related to the instant lawsuit are not chargeable, based on expert testimony, constituted error.[28] Finally, OKC argues that, even assuming the expert testimony was admissible to interpret the Farmout, the testimony was inadmissible here because it lacked a proper evidentiary foundation and timely objection to its admission was made.

Over the objection of OKC, the district court accepted the testimony of its own expert and the two expert witnesses produced by Aminoil. The court's own expert, appointed pursuant to Rule 706 of the Federal Rules of Evidence, was Julian P. Brignac. Brignac is an attorney and certified public accountant who retired in 1982 from

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27. Paragraph IV(e)(2) of the Farmout provides that against the net profits account shall be charged:

> an amount equal to the expenses of *litigation*, liens, judgments, and liquidated liabilities and claims incurred and paid by OKC on account of its ownership interest in the subject lease, or incident to the development, exploration, operation, or maintenance thereof.

(emphasis added).

28. OKC argues that the plain language of the Farmout provision dealing with litigation expenses allows OKC to charge against the net profits account the litigation expenses incurred by OKC "on account of its ownership interest in the subject lease" and that the instant lawsuit results from OKC's ownership interest in the lease. OKC argues that there is no technical term or term of art in Paragraph IV(e)(2) for which expert testimony was required, and appears to view the expert testimony on the propriety of the charge for litigation expenses as testimony relating to the subjective intent of the parties.

his position as a partner in the accounting firm of Peat Marwick Mitchell & Company and is now special counsel to a law firm. Aminoil's experts were Ronald Bannister and William Powell, partners in the accounting firm of Price Waterhouse & Co. Bannister and Powell testified to their extensive accounting experience in general and, in particular, to their oil and gas accounting experience. They were accepted by the court as experts in oil and gas accounting.

Powell and Bannister testified that the net profits accounting provisions in the Farmout at issue in this case, as with similar accounting provisions, are consistently interpreted to exclude interest unless interest is specifically designated as a chargeable item.[29] With regard to OKC's charge against the net profits account for litigation expenses, Powell and Bannister testified that such accounting language, under accepted accounting practices in the oil and gas industry, never includes legal expenses related to a dispute between the contracting parties.[30]

In response to OKC's objection to the expert testimony on the ground that expert accountants should not be allowed to "interpret" the Farmout's accounting provisions, the court noted that the net profits accounting provisions in the Farmout have a specialized usage and meaning within the oil and gas accounting field; expert accounting testimony was required to explain the accounting interpretation of those provisions.[31] The court stated:

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29. Bannister also noted the absence in the Farmout of any method for determining how interest would be calculated or charged.

30. OKC does not dispute that the deposition testimony of Brignac, the court-appointed expert, supports the testimony of Powell and Bannister.

31. Calling it misplaced, the court rejected OKC's objection based on the parol evidence rule that the testimony seeks to elicit extrinsic

> These experts are interpreting these net profits accounting provisions, but it is their accounting interpretation based on their training and experience, which they are explaining in aid of this Court's legal determination of the issue of whether OKC has improperly charged such legal expenses and interest. They have not testified violative of the parol evidence rule. Neither Aminoil nor OKC contend that the farmout is ambiguous.

Aminoil USA, Inc. v. OKC Corporation, 629 F.Supp. 647, 654 (E.D.La.1986). The court found that Louisiana Civil Code Article 2047 controlled. Article 2047 provides:

> The words of a contract must be given their generally prevailing meaning.
>
> Words of art and technical terms must be given their technical meaning when the contract involves a technical matter.

La.Civ.Code Ann. art. 2047 (superseding arts. 1946 and 1947 of the 1870 Civil Code). Further, the court cited Rule 702 of the General Rules of Evidence as support for the court's rejection of OKC's objections. Rule 702 provides:

(footnote 31 continued)

evidence with respect to an unambiguous contract. The court noted a section from OKC's submission to the court's expert wherein OKC stated:

> It is defendant's position, therefore, that the court-appointed expert witness should review and analyze the May 9 letter in light of generally accepted accounting and auditing principals [sic] in the oil and gas industry to prepare himself to present his expert opinion regarding the propriety of the categories of charges enumerated above and the proper account of said charges at the hearing before the Court on the accounting issues.

Defendant's Statement of the Case and Definition of Issues.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed.R.Evid. 702. Finally, the court noted that "[t]he evidence does not vary or contradict the net profits accounting provisions. It explains them." 647 F.Supp. at 654.

[8] We note first that in a diversity case, the Federal Rules of Evidence govern the admissibility of evidence. *Garwood v. International Paper Co.*, 666 F.2d 217, 223 (5th Cir. Unit B 1982). "The admission or exclusion of expert testimony is a matter left to the discretion of the trial judge, and his or her decision will not be disturbed on appeal unless it is manifestly erroneous." *Perkins v. Volkswagen of America, Inc.* 596 F.2d 681, 682 (5th Cir. 1979)(citing Fed.R.Evid. 702); *see also Vallot v. Central Gulf Lines, Inc.*, 641 F.2d 347, 350 (5th Cir. Unit A 1981).[32] In this case, the decision of the trial court to admit expert testimony clearly does not require reversal.

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[32] Other Fifth Circuit cases have phrased the standard of review of the district court's admission or exclusion of expert testimony under Fed.R.Evid. 702 as one of "abuse of discretion." *See, e.g., Garwood*, 666 F.2d at 223. We construe these various statements of the standard of review to be harmonious. As several Fifth Circuit cases (decided before Rule 702 was enacted) observed, "[o]nly if we determine that [the district court's] decision is 'manifestly erroneous' may we find that [the district court] abused [its] discretion." *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529, 535 (5th Cir. 1974); *see also Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 964 (5th Cir. 1975). In this regard we also note that the panel in *Garwood*, in support of its statement that the district court's admission or exclusion of expert testimony is reversible only for abuse of discretion, cited *Vallot* and *Perkins*, both employing the "manifestly erroneous" phraseology.

In arguing that the district court erred in excluding the charges for interest and litigation expenses from the net profits account on the basis of the expert testimony admitted at trial, OKC correctly cites several general principles of Louisiana law. First, it is clear that courts must give legal effect to contracts according to the true intent of the parties, that intent to be determined by the words of the contract when those words are clear and explicit and lead to no absurd consequences. La.Civ.Code Ann. art. 2046; *see, e.g., Leenerts Farms, Inc. v. Rogers,* 421 So.2d 216, 218 (La.1982). Further, under Louisiana law, contractual provisions are to be given their "generally prevailing meaning." La.Civ.Code Ann. art. 2047; *see, e.g., Fishbein v. Bankston,* 426 So.2d 649, 651 (La.App.1st Cir. 1982).[33] However, OKC fails to give weight to the very provision of the Louisiana Civil Code that the district court cited in support of its decision to reject OKC's objection to the admission of expert testimony. Article 2047, after providing that words of a contract must be given their generally prevailing meaning, recognizes that "[w]ords of art and technical terms must be given their technical meaning when the contract involves a technical matter."[34] La.Civ.Code Ann. art. 2047; *see, e.g.,. Van Geffen v. Herbert,* 439 So.2d 1257, 1259

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[33] We also acknowledge the principle that contract provisions must be interpreted in light of the other contract provisions so that each provision is given the meaning suggested by the contract as a whole. La.Civ.Code Ann. art. 2050. We do, however, find OKC's argument that its interpretation of the word "costs" was consistent with the object of the Farmout to be without force here.

[34] We believe that this Civil Code section adequately addresses OKC's contention that had the parties wished to incorporate accounting definitions into their agreement, they could and would have done so, and therefore, that the admission of expert testimony was improper.

We note that OKC seems implicitly to have recognized that the technical meaning of the Farmout term "cost" is relevant. In its brief to this court, OKC argues that its interpretation of "cost" is supported by the meaning of the word as used and understood in the accounting profession, citing Statement No 34, issued by the Financial Accounting

(La.App. 5th Cir. 1983)(stating that article 1947 of the Civil Code, whose substance is reported in article 2047, provides that terms of art or technical phrases must be interpreted according to received meaning in the profession or art in question).[35]

[9] Consistent with article 2047, and with Fed.R.Evid. 702, the district court admitted the testimony of Bannister, Powell and Brignac. We believe that the district court's admission of this expert testimony was not

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(fotnote 34 continued)
Standards Board ("FASB"). In OKC's view, the FASB Statement, introduced by OKC on cross-examination of Aminoil's expert witnesses, establishes that the interest charges claimed by OKC are part of the "cost" of development of the lease referred to in Paragraph IV(e)(1) of the Farmout.

[35] We note that the district court, in its opinion, cited Paragraph IV(c) of the Farmout which provides that "OKC shall maintain a net profits account in accordance with the terms of this agreement and good accounting practices." Aminoil attaches great significance to this provision, using it to support the admission of the expert testimony in this case. Aminoil describes the expert testimony provided by Bannister and Powell as "regarding the accounting interpretation of the net profits provisions of the Farmout *necessary to maintain a proper net profits account.*" Original Brief of Plaintiff-Appellee at 39 (emphasis in original). We find it questionable whether Paragraph IV(c), providing that the net profits account is to be kept in accordance with good accounting practices, relates in any way to a determination of which charges against net profits are allowable and whether it provides any support for the admission of expert testimony in this case. However, since we believe that a fair reading of the district court's opinion belies reliance by the court on Paragraph IV(c) in its decision to admit the testimony and instead, shows a justifiable reliance on Fed.R.Evid. 702 and La.Code Ann. art 2047, we affirm the district court's decision without resolving the issue.

Further, OKC makes the argument that even assuming that expert testimony was admissible to interpret the Farmout, the testimony was inadmissible here because it lacked a proper evidentiary foundation. For the reasons set forth above, particularly that the testimony was properly admitted under article 2047 as explanatory of the technical meaning of the terms, we find this argument to be meritless.

manifestly erroneous. Indeed, in this case, the admission of the expert testimony of the individuals experienced in the oil and gas accounting field for the purpose of obtaining explanation of the technical meaning of terms used in the net profits accounting provisions of the Farmout seems prudent.[36] *See, e.g., Gorenflo v. Texaco, Inc.*, 735 F.2d 835, 838 (5th Cir. 1984)(noting in Louisiana diversity case that "[a]rticles 1946 and 1947 of the [1870] Louisiana Civil Code direct interpretation of the words 'develop and operate' [in oil, gas and mineral lease] consistent with their received meaning within the oil and gas industry."); *Van Geffen v. Herbert*, 439 So.2d 1257 (La.App. 5th Cir. 1983)(applying principle of 1870 Civil Code article 1947 "that terms of art or technical phrases appearing in contracts are to be interpreted according to their received meaning in the profession or art in question" and concluding that lease term "practice of general dentistry" does not include specialized practice of orthodontics; court relied on testimony of several expert dental witnesses); *cf. Agnelly v. Lauricella*, 383 So.2d 813 (La.App. 4th Cir. 1980)(finding testimony of certified public accountant served to assist court in interpretation of accounting terms, citing 1870 Civil Code article 1947). Under the substantive law of Louisiana, the technical meaning of the technical terms used in the Farmout was relevant. To maintain, as OKC does, that contract terms for which one can find a dictionary definition must be interpreted as per that dictionary definition is to ignore article 2047's dictate that technical terms be given their technical meaning when the contract involves a technical matter. What better way is there to discover the technical meaning than through the use of Federal Rule of Evidence 702.

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[36] Our conclusion applies with equal force to the admission of expert testimony with respect to both the interest and litigation expense charges. The testimony offered by the experts served the same purpose, *see* La.Civ.Code Ann. art. 2047, with respect to both issues.

[10] In conclusion, we note that the district court's finding that the charges for interest and litigation expenses claimed by OKC are prohibited was not erroneous.

IV.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
April 8, 1986

AMINOIL USA, INC.	*	CIVIL ACTION
	*	
VERSUS	*	NO. 81-1169
	*	
OKC CORP.	*	SECTION "E"
	*	
	*	MAGISTRATE

JUDGMENT

This matter having come on for hearing on March 28, 1984 on the motion of Aminoil U.S.A. Inc. (now Phillips Petroleum Company) ("Phillips"), plaintiff herein, for summary judgment and to exclude parol evidence against OKC Corp. and OKC Limited Partnership ("OKC"), defendants, and the Court having granted said motions by minute entry of April 3, 1984, for the Reasons stated in its July 27, 1984 minute entry; and

FURTHER, the accounting prayed for by Phillips against OKC having come on for trial before the Court on November 1, 1985, and the issues having been duly tried and a decision having been duly rendered by the Court in its Findings and Conclusions of March 5, 1986:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The overriding royalty and net profits interest owned by Phillips under the terms of that Agreement dated

May 9, 1977, between Phillips and OKC (copy of which was introduced into evidence in these proceedings as Joint Exhibit A and to which specific reference is made for all purposed hereof), apply to all property covered by OCS Lease Number G-1618 covering the entirety of South Pass, Block 89, all as more fully described in the said Farmout Agreement, and said overriding royalty and net profits interest is a burden upon and shall be calculated with respect to any and all production attributable to the 25% of 100% working interest acquired by OKC under the said Farmout Agreement.

2. Defendants OKC Corp. and OKC Limited Partnership are liable jointly, severally and in solido to Phillips, for all sums due under the terms of aforesaid Farmout Agreement dated May 9, 1977, computed: (i) for the period June 14, 1977 through June 30, 1984 as shown in OKC's Net Profits Accounting on file in this record, as modified by the Court's Findings and Conclusions and in the Joint Stipulation of the parties, and (ii) subsequent to June 30, 1984, all such sums which have or will become due shall be calculated and paid in accordance with the Farmout Agreement and the Court's said Findings and Conclusions with respect thereto.

3. Defendants are hereby ordered to pay all said sums which are past due as the date of this Judgment to plaintiff together with legal interest on all such sums at the rate of 12% per annum from the date said sums became due and owing to plaintiff under said Farmout Agreement, until paid.

4. Defendants shall pay all costs of these proceedings, including all costs attributable to the Court's expert, Julian Brignac, Esq.

New Orleans, Louisiana, this 8th day of April, 1986.

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
United States District Judge

1167U

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
MAR 5, 1986

AMINOIL USA, INC.	CIVIL ACTION
VERSUS	NO. 81-1169
OKC CORP.	SECTION E/5

FINDINGS AND CONCLUSIONS

In May 1980, defendant, OKC Corp., entered into a liquidation of its assets and its interest in the subject matter of this lawsuit was transferred to OKC Limited Partnership. The parties have stipulated that any judgment rendered regarding OKC Corp. applies equally to OKC Limited Partnership, and both entities are collectively hereinafter referred to as "OKC."

Plaintiff, Aminoil USA, Inc. has changed its name to Aminoil, Inc. and thereafter merged with Phillips Oil Company, which subsequently merged with Phillips Petroleum Company. Plaintiff will be referred to herein as "Aminoil."

By letter agreement dated May 9, 1977 (the "farmout"), Aminoil farmed out to OKC Aminoil's 1/4 interest in a mineral lease granted by the United States, as lessor, covering South Pass Block 89 (OCS-G-1618) on the Outer Continental Shelf, offshore Louisiana. (Joint Exhibit A). Under this farmout, Aminoil retained an overriding royalty interest in production subject to the condition that when South Pass Block 89 reached a "net profits" status -- in

general terms, when the income from this mineral property exceeded the costs and expenses of exploration and production -- the overriding royalty interest of Aminoil would convert to a very substantially greater "net profits" interest.

A dispute arose between the parties as to whether Aminoil's retained overriding royalty interest and net profits interest in production related to all production from the above-mentioned lease, as Aminoil contended, or whether it related only to production of discovered prior to the time the farmout was executed, to be produced only from Platform A located in the northern portion of the lease block, as OKC contended. Aminoil instituted this civil action seeking declaratory judgment as to its ownership of an overriding royalty interest and net profits interest and moved for partial summary judgment decreeing that the farmout is clear and unambiguous and provides that Aminoil's retained interest is applicable to production from the entirety of South Pass Block 89, and not merely, as OKC contended, to the production from the northern portion of the block. By minute entry dated July 27, 1984, the Court granted Aminoil's motion, and also granted Aminoil's separate motion *in limine* to exclude parol evidence offered by OKC for purposes of interpretation and/or reformation of the farmout. The Court further ordered that OKC render an accounting to Aminoil for all proceeds of production attributable to Aminoil's overriding royalty interest and net profits interest in accordance with the Court's construction of the farmout. (Record Documents 274-276.)

OKC's accounting was served upon Aminoil (OKC Exhibit D-1), and thereafter Aminoil served exceptions to this accounting, taking issue with one of the credits and several of the charge items contained in the accounting. (Aminoil Exhibit P-1.)

The Court appointed Julian P. Brignac as an expert witness under the provisions of Fed. R. Evid. 706. On August 23, 1985, Mr. Brignac submitted his written report. Thereafter, his deposition was taken in connection with this matter and was offered at the trial by Joint Stipulation of the parties as Aminoil Exhibit P-3, subject to objection by OKC as to certain portions of his testimony. (Joint Stipulation, para. 9.)

The parties have amicably resolved all issues under the OKC accounting except two charges made by OKC to the net profits account: (a) OKC's $29,966,096 interest charge; and (b) OKC's $514,728 charge for legal expenses incurred in connection with this litigation. OKC contends it is entitled under the farmout to recoup these amounts from production from the lease before Aminoil's overriding royalty converts to the substantially greater net profits interest. Aminoil argues to the contrary.

In its original accounting, OKC charged to the net profits account the sum of $29,966,096 as interest on funds spent by OKC in developing the lease after the farmout based on the cost of funds to OKC. (OKC Exhibit D-1.) To reflect the adjustments made to the accounting as a result of the stipulation of the parties, this interest amount, through June 30, 1984, has also been adjusted and now is calculated to be $29,666,997. (Joint Stipulation, para. 6.)

Of the amount of $29,666,997 in interest which OKC claims is chargeable against the Net Profits Account, $7,900,000 was actually incurred for capital borrowed by OKC and attributable to costs of exploratory and developmental operations on, and production of minerals from, South Pass Block 89 under OCS-G-1618. The remainder of the total interest figure, $21,766,997, is imputed interest, or the time value of money utilized by OKC to participate in the operations on and production of

minerals from OCS-G-1618, calculated at the rates and by the methodology reflected in the Net Profits Accounting. (OKC Exhibit D-1, Joint Stipulation, para. 6.) Aminoil does not dispute the method of calculation of the "imputed" interest actually incurred by OKC. (Joint Stipulation, para. 6.)

Additionally, in its accounting, OKC charged expenses incurred by it in connection with the instant litigation against the net profits account. OKC, thus, seeks to charge against the net profits account the sum of $484,529,[1] representing legal expenses incurred in this litigation, the sum of $18,185, representing fees paid to Core Laboratories for consulting work done in connection with this litigation, and $42,272, representing payments made by OKC to potential expert witnesses retained in connection with this ligitation.[2] The parties have stipulated that these several items should be treated together as expenses of litigation. (Joint Stipulation, para. 9.)

Trial proceeded to resolve the two remaining issues before the Court, namely:

1) Did OKC improperly charge its legal expenses arising out of this lawsuit to its net profits account?

2) Did OKC improperly charge real and imputed interest to its net profits account?

---

[1] OKC's charge against the account representing legal expenses has been reduced by $30,199 since such amount represented one invoice that was inadvertently charged twice to the account by OKC.

[2] These expert witness fees were initially placed by OKC in the general and administrative expense category. The Aminoil exception disallowed $42,682 citing "coding errors." OKC then reviewed the pertinent invoices and determined that $42,274 of this amount represented payments made to expert witnesses. The parties have stipulated that this amount should be included in the litigation expense category. (Joint Stipulation, para. 8.)

Both sides concede that these issues must be resolved by application of the net profits accounting provisions of the farmout, which are controlling.

Paragraph IV(c) on page 3 of the farmout requires OKC to maintain a net profits account for the purposes of determining when net profits is achieved:

"OKC shall *maintain a net profit account in accordance with the terms of this agreement and good accounting practices; ...*" (Emphasis added.).

OKC prepared a net profits accounting and submitted it together with a letter from Coopers & Lybrand, certified public accountants. (OKC Exhibit D-4.) The letter is merely a confirmation of OKC's arithmetic and specifically states that the procedures undertaken by Coopers & Lybrand "do not constitute an examination made in accordance with general accepted auditing standards..." (OKC Exhibit D-4 at p. 6).

Aminoil retained the services of Price Waterhouse, certified public accounts, to review the farmout, examine OKC's net profits accounting and the undertaking documents and prepare a report in accordance with the net profits accounting provisions of the farmout. This report, (Aminoil Exhibit P-1), prepared by Price Waterhouse and, as requested by paragraph IV(c) of the farmout, specifically notes the application of accepted accounting practice in the oil and gas industry:

> "However, we believe that the table column entitled 'Net Profits Accounting, as Adjusted' reflects the Net Profits Accounting in accordance with the provisions of the farmout agreement and with generally accepted accounting practice in the oil and gas industry."

In aid of its resolution of the exceptions taken by Price Waterhouse to OKC's Net Profits Accounting, this Court appointed Mr. Julian P. Brignac as its own independant expert. Mr. Brignac is an attorney and a certified public accountant and retired in 1982 after many years as a partner with the accounting firm of Peat Marwick Mitchell & Co. He is now special counsel to the law firm of Jones, Walker, Waechter, Pointevent, Carrere & Denegre. For almost 40 years, Mr. Brignac has been employed in the tax and accounting areas and is familiar and experienced with accounting procedures and principles. He testified in his deposition at length concerning his expertise. (Brignac deposition, Aminoil Exhibit P-3, pp. 5-35, 92-93.) His report was submitted to the Court. (Aminoil Exhibit P-2.) As regards the two matters in dispute, Mr. Brignac is in agreement with Price Waterhouse.

The net profits accounting provisions contained in this farmout agreement have a specialized usage and meaning within the oil and gas accounting field. Obviously, expert accounting testimony was required to explain the accounting interpretation of the net profit accounting provisions at issue. OKC argues that such is improper and objects based on the parol evidence rule that this testimony seeks to elicit extrinsic evidence with respect to an unambiguous contract. This argument and objection are misplaced. In its submission to the Court's expert, Julian P. Brignac, entitled "Defendant's Statement of the Case and Definition of Issues" OKC stated:

> "It is defendant's position, therefore, that the court-appointed expert witness should review and analyze the May 9 letter in light of generally accepted accounting and auditing principals [sic] in the oil industry to prepare himself to present his expert opinion regarding the propriety of the categories of charges enumerated above and the proper account of said charges at the hearing before the Court on the accounting issues."

(Aminoil Exhibit P-3, Brignac deposition, attachments.)

The farmout agreement treats at great length the manner in which net profits are to be calculated. (Joint Exhibit A at pp. 3-7.) Interest, actual or imputed, is not addressed. On the other hand, taxes and insurance premiums, together with various other items are specifically addressed as charges. Obviously, the parties were aware of the certainty of taxes and insurance premiums and, accordingly, addressed them. They chose not to include the equally obvious interest, actual and imputed, which would result from the operation, as charges.

Paragraph IV(e)(1) of the farmout provides that against the net profits account shall be charged the following:

> [A]n amount equal to the costs to OKC of all direct labor (excluding fringe benefits), transportation, and other services necessary for exploring, developing, equipping, operating and maintaining the subject lease; and of all material, equipment, and supplies purchased by OKC and used on the subject lease; and of any amounts charged to OKC in connection with the creation of any unit or units in which the subject lease is or may be included; and of that portion of any other amounts paid to any operator.

OKC argues that under the generally prevailing meaning of the word "cost," the interests deduction sought here by OKC represents part of the "cost" to OKC of "labor, . . . transportation, and other services necessary for exploring, developing, equipping, operating and maintaining the . . . lease" and of "all material, equipment, and supplies purchased by OKC." That is, the interest cost to OKC represents "[t]hat which is sacrificed" by OKC to realize a benefit: participation in production from the lease for both

OKC and Aminoil.

At the trial of this matter Aminoil called Price Waterhouse partners William Powell and Ronald Bannister to testify. By stipulation Julian P. Brignac's testimony was presented through his deposition. Both Mr. Powell and Mr. Bannister testified as to their accounting experience in general and in particular their extensive oil and gas accounting experience. Both men have performed a tremendous amount of audit and accounting work involving various types of oil and gas contracts such as leases, assignments and farmouts. Many of these contracts contained net profits accounting provisions or payout accounting provisions, similar to this farmout, where one party is allowed to recover specified expenses prior to another party's succeeding to a greater interest. Specifically, this work included checking the propriety of costs and other charges made to net profits or payout under the accounting provisions of the agreement involved. Both Mr. Powell and Mr. Bannister were accepted by the Court as experts in oil and gas accounting without challenge by OKC. Whereas both Mr. Powell and Mr. Bannister stated that any agreement which would allow the interest charge would not violate sound accounting principles, it is the accounting procedure set forth in the net profits accounting provisions which defines the contractual agreement between Aminoil and OKC as to what costs can be properly charged by OKC to the net profits account. This is an accepted practice in the oil and gas industry and these net profits accounting provisions have a specialized and technical meaning and usage within the oil and gas accounting profession and must be interpreted according to their accepted usage. Both Mr. Powell and Mr. Bannister testified unequivocally that interest which OKC charged to the net profits account was improper, whether it be actual or imputed.

Each stated that the net profits accounting provi-

sions in this farmout, as with similar accounting provisions, are consistently interpreted to exclude interest unless interest is specifically designated as a chargeable item. Mr. Powell testified:

> "Q. All right. Let's go to the interest item, noted as exception 7 of your report.
>
> Can you explain for us why you decided that interest was not chargeable to the net profits account, or why Price Waterhouse decided that?
>
> A. Yes. sir. It was my conclusion, based upon the reading of the Farmout Agreement; based upon my cumulative knowledge within the oil and gas industry; based upon consultation with Mr. Bannister, the lead partner on the engagement; based upon conversations with Mr. Keith Claver of our Houston office of Price Waterhouse, the lead accountant and auditing specialist in the oil and gas industry; and based on a reading of numerous, numerous textbooks from Professional Development Institute, Copus --- C-O-P-U-S ---Bulletin No. 9, FASB 1925 and FASB 19, 25 and 69, it was our firm's conclusion that interest was not allowable under this agreement." (Tr. 41-42.)

and:

> "Q. And was it just Mr. Claver that you talked to among your partners, or did you talk to other partners at Price Waterhouse?
>
> A. I talked to more than Mr. Claver. As part of the process, I discussed the principles of the inclusion of interest in a farmout arrangement and a payout calculation with several partners and managers in the Dallas office, who participate in

the oil and gas industry, and who are also considered experts in the oil and gas industry by our firm, and they were all unanimous that unless interest was specifically mentioned in the farmout agreement, then interest was not an includable or not allowable as a charge to the agreement.

I, also, during a meeting of our petroleum industry services group, a group of over 25 partners and managers with special expertise in clients in the oil and gas industsry, again I raised the question of, or the principle of, including interest --

I discussed the principle of including interest in a net profits or payout calculation where it was excluded from the language of the farmout or payout agreement, and it was again unanimous that they would not, or had not seen interest ever included where it was silent in that farmout agreement." (Tr. 42-43.)

Mr. Bannister noted the crucial absence of any method for determining how interest would be calculated and charged, and stated:

"Q. Would you please continue, sir?

A. I believe that the contract would have had some rather extensive discussion of the concept of interest charges, including some rather detailed specifics, as to the methodology of some computations, the rates to be used, the basis upon which the rates to be determined, whether tied to incremental borrowing rates of the operator or the T-bill rates, or whatever -- T-bill, Treasury Bill rates -- and the methodology as to how those rates were to be applied to a base. In other words, the computation I think would have been dealt with in the document.

Failing to see such a provision and failing to see any other language which would, in this farmout agreement, I have -- I cannot conclude that the parties intended for interest to be included in the calculation.

Q. And that's based on your review of the terms of the accounting provisions, in light of the accepted practices, accounting practices in the oil and gas industry?

A. Yes.

Q. And when you say you can't conclude the intent was such, the only measure you have of their intent is the document itself?

A. That is correct. I might say that I am not aware -- I have asked -- whether there have been any supplemental agreements or correspondence on this point between the parties, which would effectively serve as an amendment to the agreement, or a supplement to the agreement, and I have been told it has not been dealt with; that the agreement stands on its own feet and speaks for itself.

Q. Is there any reference in the accounting provisions of this agreement at all to interest, in any respect whatsoever?

A. I see none." (Tr. 87-88.)

With regard to the issue of legal expenses, the farmout, Paragraph IV(e)(2) provides that against the net profits account shall be charged the following:

[a]n amount equal to the expenses of litigation, liens, judgments and liquidated liabilities and claims incurred and paid by OKC on account of its

ownership interest in the subject lease, or incident to the development, exploration, operation, or maintenance thereof.

OKC argues that the plain language of this provision allows OKC to charge against the account the expenses of litigation incurred by OKC "on account of its ownership interest in the subject lease" and that the instant litigation brought by Aminoil against OKC results from OKC's ownership interest in the lease.

Both Mr. Powell and Mr. Bannister elaborated on Price Waterhouse's exception to OKC's attempt to charge legal expenses related to this lawsuit under paragraph IV(e)(2). Both testified unequivocally that such accounting language, under accepted accounting practices in the oil and gas industry, never includes legal expenses related to a dispute between the contracting parties.

Mr. Powell testsified:

"Q. Since the only points which OKC is now contesting in this report on the merits are legal expenses and interest fees, let's go straight to legal expenses, and would you tell me why Price Waterhouse has disallowed OKC's legal expenses related to this lawsuit that we are involved in today?

A. Yes, sir. Based on my reading of the Farmout Agreement, based on my experience within the industry, Mr. Bannister's experience within the industry, our consultation with leading audit and accounting specialists within the oil and gas industry, it was our conclusion that legal expenses between the two parties of this agreement, Aminoil and OKC, would not be includable in this farmout

agreement. This farmout agreement would relate, or these legal paragraphs in the agreement, Paragraph IV(e)(2) would relate to litigation with respect -- or legal fees incurred with respect to protecting the title of the property, some damages incurred, barges running into the platform, any personal injury suit, somebody get hurt on the platform, something of that nature; but certainly, not between the two parties to the agreement." (Tr. 36.)

Mr. Powell's opinion was echoed by Mr. Bannister:

"Q. And it was your conclusion that legal expenses arising out of this lawsuit between Aminoil and OKC were not chargeable to the net profits account as a legal expense?

A. That was and is my conclusion, yes.

And I reached that conclusion on the basis of my reading of the various provisions in the agreement, including but not limited to the subparagraph (4), which deals with -- I'm sorry -- it's IV(e)(2), which deals with the definition of types of charges which can be made to the net profits account with respect to litigation, liens, judgments, claims and the like.

Q. Well, based on your expert opinion and experience, what type of legal expenses would be chargeable under that provision?

A. In my judgment, this paragraph refers to matters that OKC would encounter in connection with the defense of its title to the property with the normal pursuit of the business, that is, the development and exploration and operation and maintenance of the property, as it relates to outsiders, if you please.

Q. Well, if for example, a worker slips on a platform and injures himself, and sues OKC and other operators, that would be the type of expenses chargable?

A. Yes, that would be exactly what I had in mind, as well as situations such as, I believe Mr. Powell referred to the possibility of a marine collision, which might lead to litigation surrounding damages, and so forth.

Q. Yes, sir."

"Q. During your career of almost forty years in the accounting field, have you seen legal fees, accounting provisions, similar to the one in this farmout?

A. Yes, I have.

"Q. Is the one in this farmout typical of the others you have seen?

A. Yes, quite similar.

Q. Do you know of any occasion in your experience where you or anyone else treated such language as including legal expenses arising from a dispute between the parties to the agreement?

A. No, sir, I have not." (Tr. 83-84.)

The expert appointed by the Court, Mr. Julian P. Brignac, conducted exhaustive research into the issues at hand. Although Mr. Brignac did not appear in person at trial, his August 23, 1984 report to this Court and his deposition testimony, both of which were introduced into evidence at the trial, fully support the testimony and evidence presented by the Price Waterhouse witnesses as

to both legal expenses and interests. (Aminoil Exhibit P-3, Brignac dep., Tr. 73, 75-76, 80-88).

OKC produced no testimony or evidence at the trial in support of its net profits accounting or any evidence in contracention of the testimony of the Price Waterhouse witnesses or Julian P. Brignac. OKC has objected to all expert testimony by arguing that these expert accountants should not be allowed to "interpret" the net profits accounting provisions of the farmout. OKC's entire case then rests on its objection to any expert accounting testimony regarding the net profits accounting provisions. Clearly OKC's objection to all expert accounting testimony in this case in improper. The unchallenged expert testimony of three expert accounting witnesses that the net profits accounting provisisons of this farmout do not permit OKC to charge legal expenses arising out of this lawsuit or interest is persuasive and is accepted. These experts are interpreting these net profits accounting provisions, but it is their accounting interpretation based on their training and experience, which they are explaining in aid of this Court's legal determination of the issue of whether OKC has improperly charged such legal expenses and interest. They have not testified violative of the parol evidence rule. Neither Aminoil nor OKC contend that the farmout is ambiguous. The Louisiana Civil Code, L.S.A. - C.C. art. 2047 is controlling. It provides:

> "The words of a contract must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the contract involves a technical matter."

Further, Rule 702, Federal Rules of Evidence supports the Court's rejection of OKC's objections at trial. It provides:

> "If scientific, technical, or other specilized

> knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

The evidence does not vary or contradict the net profits accounting provisions. It explains them.

The evidence introduced into the record at the trial of this matter clearly established that the net profit accounting provisions of the farmout prohibit OKC's attempt to charge legal expenses related to this lawsuit and interest to the net profits account.

In view of the Court's resolution of the foregoing issues, all costs of these proceedings, including all costs of the Court-appointed expert, Mr. Julian P. Brignac, are taxed against OKC.

The Court directs that the parties attempt to draft a form of judgment acceptable to each of them in conformity with the Court's rulings herein. Should they be unable to agree each side is to submit a proposed form of judgment.

New Orleans, Louisiana, this 5th day of March, 1986.

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX E

MINUTE ENTRY
APRIL 3, 1984
CASSIBRY, J.

Filed
MAR 5, 1986

AMINOIL USA, INC. — CIVIL ACTION

VERSUS — NO. 81-1169

OKC CORP. — SECTION "FJC" (5)

***

A pre-trial conference was held in this matter on March 28, 1984. The following counsel were present:

R. King Milling, Esq.
Kennedy J. Gilly, Jr., Esq.
Patrick A. Talley, Jr., Esq.
Attorneys for Plaintiff

Gene W. Lafitte, Esq.
John M. Wilson, Esq.
George W. Pugh, Jr., Esq.
Attorneys for Defendant

Motion of Aminoil for partial summary judgment which is reurged will be GRANTED.

The counterclaim of OKC will be dismissed.

Accounting will be referred to a special master.

The deposition that OKC referred to in its Opposition to Aminoil's Motion for Partial Summary Judgment will be made a part of the record.

DATE OF ENTRY APR 4 1984